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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 ALEXANDRA AUGUSTE-LEWIS,

11 Plaintiff,

12 v.

13 UNITED STATES OF AMERICA,

14 Defendant.

CASE NO. C12-1901JLR

ORDER GRANTING UNITED  
STATES' MOTION TO DISMISS

15 **I. INTRODUCTION**

16 Before the court is Defendant United States of America's second motion to  
17 dismiss *pro se* Plaintiff Alexandra Auguste-Lewis's complaint. (2d Mot. (Dkt. # 39).)

18 The court has considered the motion, all submissions filed by the parties related to the

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1 motion, the balance of the record, and the applicable law. Being fully advised,<sup>1</sup> the court  
 2 GRANTS the motion and DISMISSES Ms. Auguste-Lewis's complaint with prejudice.

## 3 II. BACKGROUND

4 This lawsuit arises out of an automobile accident that occurred on October 26,  
 5 2009, between vehicles driven by Ms. Auguste-Lewis and United States Postal Service  
 6 ("USPS") employee, Jorge Santis. (*See* Compl. (Dkt. # 3) at 2.) On December 1, 2009,  
 7 counsel for Ms. Auguste-Lewis notified USPS of Ms. Auguste-Lewis's intent to file a  
 8 claim for damages allegedly arising from the October 26, 2009, accident. (Bjurstrom  
 9 Decl. (Dkt. # 39-2) ¶ 9, Ex. A (attaching the December 9, 2009, letter from Ms. Auguste-  
 10 Lewis's attorney).)

11 On December 2, 2009, USPS sent Ms. Auguste-Lewis's attorney instructions on  
 12 how to file a claim with the agency and included a Standard Form 95 ("SF-95"), which is  
 13 the form used to initiate an administrative tort claim against the United States. (*Id.* ¶ 10,  
 14 Ex. B (attaching the letter from USPS's tort claim coordinator to Ms. Auguste-Lewis's  
 15 attorney).) On December 23, 2009, Ms. Auguste-Lewis's attorney informed USPS that  
 16 as of December 17, 2009, he and his firm no longer represented Ms. Auguste-Lewis. (*Id.*  
 17 ¶ 11, Ex. C (attaching the letter from Ms. Auguste-Lewis's attorney to USPS).)

18 On November 14, 2012, Ms. Auguste-Lewis, acting *pro se*, submitted an SF-95  
 19 form to USPS claiming \$697,000.00 in total damages allegedly caused by the October 26,  
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21 <sup>1</sup> No party has requested oral argument and the court deems it unnecessary to aid in the  
 22 disposition of this matter. *See* Local Rules W.D. Wash. LCR 7(b)(4) ("Unless otherwise ordered  
 by the court, all motions will be decided by the court without oral argument.".)

1 2009, automobile accident. (*Id.* ¶ 12, Ex. D (attaching the SF-95 form and proof of  
2 service).) USPS acknowledged receipt of the SF-95 form that same day. (*Id.* ¶ 13, Ex. E  
3 (attaching the letter from USPS to Ms. Auguste-Lewis).)

4 On November 20, 2012, USPS informed Ms. Auguste-Lewis that her claim was  
5 assigned to the National Tort Center of USPS for adjudication. (*Id.* ¶ 14, Ex. F (attaching  
6 letter from Tort Claims Adjudicator to Ms. Auguste-Lewis).) On February 5, 2013,  
7 USPS denied Ms. Auguste-Lewis's administrative claim as untimely due to the expiration  
8 of the Federal Tort Claims Act's ("FTCA"), 28 U.S.C. § 2401(b), two-year statute of  
9 limitations. (*Id.* ¶ 15, Ex. G (attaching denial letter).)

10 On October 31, 2012, Ms. Auguste-Lewis filed the present action in this court.  
11 (*See Compl.*) On August 13, 2013, the United States moved to dismiss Ms. Auguste-  
12 Lewis's complaint for lack of subject matter jurisdiction based on expiration of the time  
13 limitations set forth in 28 U.S.C. § 2401(b) of the FTCA. (1st Mot. (Dkt. # 17).) On  
14 September 24, 2013, the court granted the United States' motion and dismissed the  
15 complaint. (9/24/13 Order (Dkt. # 25).) On December 6, 2013, Ms. Auguste-Lewis  
16 appealed the court's order to the Ninth Circuit Court of Appeals. (Not. of App. (Dkt. #  
17 28).)

18 The United States moved for stay of the appeal between March 2014 and February  
19 2015 pending the United States Supreme Court's decision in *United States v. Kwai Fun*  
20 *Wong*, --- U.S. ---, 135 S. Ct. 1625 (2015), which addressed whether the time limitations  
21 set forth in 28 U.S.C. § 2401(b) of the FTCA were jurisdictional in nature or merely  
22 claims processing rules. *See Auguste-Lewis v. United States*, Ninth Circuit Case No.

1 13-36146 (Dkt. ## 5, 10, 13). On July 29, 2015, the Ninth Circuit granted the United  
2 States' motion to remand the present action to allow the district court to conduct further  
3 proceedings consistent with the Supreme Court's decision in *Wong*, 135 S. Ct. at 1638,  
4 which held that the FTCA's two-year statute of limitations for filing an administrative  
5 claim under 28 U.S.C. § 2401(b) is non-jurisdictional and therefore subject to equitable  
6 tolling. *See Auguste-Lewis*, Ninth Circuit Case No. 13-36146 (Dkt. ## 17 (order), 18  
7 (mandate)).

8 Following remand, on November 10, 2015, the United States filed its present  
9 motion to dismiss, arguing that Ms. Auguste-Lewis failed to timely file her administrative  
10 claim within the two-year statute of limitations contained in 28 U.S.C. § 2401(b) of the  
11 FTCA and accordingly the United States had not waived its sovereign immunity. (*See*  
12 *generally* 2d Mot.) On January 6, 2016, Ms. Auguste-Lewis filed a submission (Resp.  
13 (Dkt. # 43)), which the court liberally construed as both a motion to extend the time in  
14 which to respond to the United States' motion and as a substantive response to that  
15 motion (1/8/16 Order (Dkt. # 44) at 2). The court granted Ms. Auguste-Lewis's motion  
16 for additional time and accepted her response as timely. (*Id.*) The United States filed its  
17 reply memorandum on January 15, 2016. (Reply (Dkt. # 45).) The court now considers  
18 the United States' motion.

### 19 III. ANALYSIS

20 The United States has sovereign immunity except when it consents to be sued.  
21 *United States v. Mitchell*, 463 U.S. 206, 212 (1983). "The FTCA waives the  
22 government's sovereign immunity for civil suits seeking money damages 'for injury or

1 loss of property, or personal injury or death caused by the negligent or wrongful act or  
 2 omission of any employee of the Government while acting within the scope of his office  
 3 or employment, under circumstances where the United States, if a private person, would  
 4 be liable to the claimant in accordance with the law of the place where the act or  
 5 omission occurred.’’ *Meier v. Shinseki*, 626 F. App’x 706, 708 (9th Cir. 2015) (quoting  
 6 28 U.S.C. § 1346(b)(1)). Common law tort claims against the United States, its agencies,  
 7 or its officers acting within the scope of their employment may only be brought under the  
 8 FTCA. 28 U.S.C. § 2679(b)(1). The United States moves to dismiss Ms. Auguste-  
 9 Lewis’s complaint arguing that it has not waived its sovereign immunity with respect to  
 10 Ms. Auguste-Lewis’s claim because she failed to timely present her administrative tort  
 11 claim within two years, as required by 28 U.S.C. § 2401(b) of the FTCA. (2d Mot. at 5-  
 12 6.)

### 13 **A. Timeliness of Claim**

14 To bring a claim under the FTCA, a plaintiff must present an administrative tort  
 15 claim to the appropriate federal agency within two years after the claim accrues:

16 A tort claim against the United States shall be forever barred unless it is  
 17 presented in writing to the appropriate Federal agency within two years  
 18 after such claim accrues or unless action is begun within six months after  
 the date of mailing, by certified or registered mail, of notice of final denial  
 of the claim by the agency to which it was presented.

19 28 U.S.C. § 2401(b); *see also* 28 U.S.C. § 2675(a) (“An action shall not be instituted  
 20 upon a claim against the United States for . . . injury of loss of property . . . caused by the  
 21 negligent or wrongful act or omission of any employee of the Government while acting  
 22 within the scope of his office or employment, unless the claimant shall have first

1 presented the claim to the appropriate Federal agency and his claim shall have been  
2 finally denied by the agency . . .”).

3 Presentment of the claim must occur within two years from the incident, *id.*, and  
4 requires that the federal agency “receive[ ] from the claimant . . . an executed Standard  
5 Form 95 or other written notification of an incident, accompanied by a claim for money  
6 damages in a sum certain for injury to or loss of property, personal injury, or death  
7 alleged to have occurred by reason of the incident.” *Bailey v. United States*, 642 F.2d  
8 344, 346 (9th Cir. 1981) (citing 28 C.F.R. § 14.2). The terms “present” and “received”  
9 have different meanings—a claim “received” by a federal agency may not be in proper  
10 form pursuant to 28 U.S.C. §§ 2401(b) and 2675(a). “Thus, a claim is presented pursuant  
11 to 28 U.S.C. § 2675(a) when a federal agency actually receives a claim with the specified  
12 requirements.” *Wages v. United States*, No. 5:14-CV-04328-HRL, 2015 WL 3809414, at  
13 \*3 (N.D. Cal. June 18, 2015).

14 Here, there is no dispute that Ms. Auguste-Lewis did not submit her SF-95  
15 administrative tort claim to USPS until November 14, 2012—more than a year after the  
16 expiration of the two-year statute of limitations set forth in 28 U.S.C. § 2401(b).  
17 Accordingly, Ms. Auguste-Lewis’s administrative claim was presented outside of the  
18 FTCA’s two-year statute of limitations and is untimely.

### 19 **B. Equitable Tolling**

20 Because Ms. Auguste-Lewis’s untimely filed her claim with USPS, the court  
21 considers whether to apply equitable tolling. As the Supreme Court explained in *Wong*,  
22 the two-year statute of limitations in 28 U.S.C. § 2401(b) is not jurisdictional and may be

1 equitably tolled. 135 S. Ct. at 1638. To invoke the doctrine of equitable tolling, a  
2 plaintiff must show (1) that she has been pursuing her rights diligently, and (2) that some  
3 extraordinary circumstances stood in her way. *Kwai Fun Wong v. Beebe*, 732 F.3d 1030,  
4 1052 (9th Cir. 2013), *aff'd and remanded sub nom. United States v. Kwai Fun Wong*, 135  
5 S. Ct. 1625 (2015). This standard is very high. *See Irwin v. Dep't of Veterans Affairs*,  
6 498 U.S. 89, 96 (1990) (stating “a garden variety claim of excusable neglect” is  
7 insufficient to show equitable tolling); *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S.  
8 147, 152 (1984) (“Procedural requirements established by Congress for gaining access to  
9 the federal courts are not to be disregarded by courts out of a vague sympathy for  
10 particular litigants.”); *Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380, 384-86 (9th Cir.  
11 1996) (affirming the district court’s rejection of an equitable tolling argument where the  
12 plaintiff did not diligently pursue her claim by filing suit on time). “The burden is on the  
13 plaintiff to show that equitable tolling is appropriate.” *United States v. Marolf*, 173 F.3d  
14 1213, 1218 n.3 (9th Cir. 1999) (citation omitted).

15 In her response to the United States’ motion, Ms. Auguste-Lewis states: “Due to  
16 prolong [sic] medical complication, I was unable to file this until I was in better health.”  
17 (Resp. at 2.) This statement provides insufficient grounds for the court to find equitable  
18 tolling to be appropriate here. Ms. Auguste-Lewis fails to explain how her medical  
19 condition prevented her from presenting her administrative claim to USPS within the  
20 two-year period provided in the statute. (*See generally* Resp.) Further, she provides no  
21 medical evidence to support her contention. (*See generally id.*) Although the court  
22 acknowledges that certain medical conditions might prevent a litigant from timely filing

1 an administrative claim within a two-year period, without greater detail, the court  
2 concludes that Ms. Auguste-Lewis has not met her high burden of establishing that  
3 equitable tolling is appropriate.

4 In addition, Ms. Auguste-Lewis asserts that she had difficulty obtaining an SF-95  
5 form. (*See Resp. at 2* (“I made several attempts in writing and in person requesting the I-  
6 95 form. . . . *The lack of accessibility to form I-95 is a violation of my rights to due*  
7 *process, the federal courts nor the post office provided this form to me after multiple*  
8 *requests.*”) (italics in original).) However, she does not dispute that USPS sent a copy of  
9 the form to her attorney of record on December 2, 2009, with instructions on how to file a  
10 claim with the agency. (*See Bjurstrom Decl. ¶ 10; see generally Resp.*) Given the high  
11 standard required to invoke equitable tolling, the court finds that it is not appropriate in  
12 this case.

13 The court concludes that Ms. Auguste-Lewis failed to timely file her  
14 administrative claim with USPS and that she has not met her burden of establishing that  
15 the court should equitably toll the limitations period. Accordingly, the court concludes  
16 that the United States has not waived its sovereign immunity with respect to Ms.  
17 Auguste-Lewis’s claim. The court, therefore, grants the United States’ motion to dismiss.

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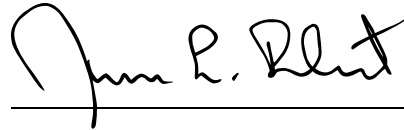
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**IV. CONCLUSION**

Based on the foregoing analysis, the court GRANTS the United States' second motion to dismiss (Dkt. # 39) and DISMISSES Ms. Auguste-Lewis's complaint with prejudice.

Dated this 28th day of March, 2016.

A handwritten signature in black ink, appearing to read "James L. Robart", written over a horizontal line.

JAMES L. ROBART  
United States District Judge